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FEC MAIL CENTER  
700 E. 13th Street, NW  
Suite 600  
Washington, D.C. 20005-3960

• +1.202.654.6200  
• +1.202.654.6211  
PerkinsCoie.com

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Marc E. Elias  
Ezra W. Reese  
MElias@perkinscoie.com  
D. +1.202.434.1609  
F. +1.202.654.9126

Jeff S. Jordan  
Office of General Counsel  
Federal Election Commission  
999 E. Street, N.W.  
Washington, D.C. 20463

Re: MUR 7193

Dear Mr. Jordan:

We write as counsel to Correct the Record ("CTR") and Elizabeth Cohen in her official capacity as treasurer ("Respondents") in response to the complaint filed by Jill Stein on November 7, 2016 (the "Complaint"). The Complaint fails to set forth sufficient facts which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act").<sup>1</sup>

### Legal Analysis

1. The Complaint does not meet the Commission's low bar for a valid complaint under 11 C.F.R. § 111.4 because it fails to identify "the source of information which gives rise to the complainant's belief in the truth" of its allegations.

To file a complaint with the FEC, the Commission requires complainants to "differentiate between statements based upon personal knowledge and statements based upon information and belief."<sup>2</sup> For statements that are "not based upon personal knowledge," the Commission requires complainants to identify "the source of information which gives rise to the complainants' belief in the truth of such statements."<sup>3</sup> Here, the Complaint alleges that Respondents violated the Act in a series of emails, memos, or documents.<sup>4</sup> The Complaint does not include any copies of the alleged emails, memos or documents. It does not explain how Dr. Stein has any personal knowledge of these alleged emails, memos, and documents, nor does it identify the source of the information which gives Dr. Stein belief that these alleged emails, memos, or documents were written and sent as she asserts. Because the Complaint fails to comply with the evidentiary requirements of 11 C.F.R. § 111.4, the Commission should dismiss it.

<sup>1</sup> See 11 C.F.R. § 111.4(d)(3).

<sup>2</sup> 11 C.F.R. § 111.4(c).

<sup>3</sup> *Id.* § 111.4(d)(2).

<sup>4</sup> See Complaint ¶¶ 4-13.

**2. Even if the Complaint had identified a source of information, the activity it alleges does not violate the Act.**

Even if the Complaint had complied with 11 C.F.R. § 111.4 in identifying the source of Dr. Stein's beliefs, none of the alleged emails, memos, or documents described in the Complaint would show a violation of the Act. The Complaint misreads the Act to argue that Respondents improperly coordinated with the Hillary Clinton campaign.<sup>5</sup> In fact, the Act does not prohibit coordination on communications other than "public communications," and the Complaint fails to allege that Respondents coordinated with the Clinton campaign on public communications.

Under 11 C.F.R. § 109.21, a communication is a coordinated communication if it meets three prongs: first, it is paid for by a person other than the candidate, authorized committee, or political party; second, it must satisfy one or more content standards; and third, it must satisfy one of several conduct standards.<sup>6</sup> The content prong can be satisfied in one of five ways.<sup>7</sup> It is satisfied if the communication is an "electioneering communication," which must be publicly distributed by a television station, radio station, cable television station, or satellite system within 60 days before a general election or 30 days of a primary election.<sup>8</sup> The Complaint does not identify any communication that would qualify as an "electioneering communication."

The remaining four ways to satisfy the content prong require that the communication be a "public communication,"<sup>9</sup> which the Act defines as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public or any other form of general public political advertising."<sup>10</sup>

Under Commission regulations, "general public political advertising" does "not include communications over the Internet, except for communications placed for a fee on another person's Web site."<sup>11</sup> In its regulations and several Matters Under Review, the Commission has consistently held that online content—including costs associated with researching and producing that content—is not a "public communication" unless a fee is paid to post it on another's website.<sup>12</sup> That also applies to distributing materials to reporters over the Internet.

<sup>5</sup> *Id.* ¶¶ 12–13.

<sup>6</sup> *See* 11 C.F.R. § 109.21.

<sup>7</sup> FEC Matter Under Review 6722 (House Majority PAC), General Counsel's Report at 4 (Aug. 6, 2013) (citing 11 C.F.R. § 109.21(c)(1)–(5)).

<sup>8</sup> *See id.* (citing 11 C.F.R. §§ 109.21(c)(1), 100.29(a), (b)(1)).

<sup>9</sup> *Id.* (citing 11 C.F.R. § 109.21(c)(2)–(5)).

<sup>10</sup> 52 U.S.C. § 30101(22).

<sup>11</sup> 11 C.F.R. § 100.26.

<sup>12</sup> *See, e.g.,* Federal Election Commission, Internet Communications, 71 Fed. Reg. 18589, 18595 (May 12, 2006)(explanation and justification) ("[P]osting a video on a Web site does not result in a 'public communication'").



candidate.<sup>19</sup> Nothing in the alleged email described in the Complaint suggests that Mr. Podesta solicited soft money for these outside organizations, and even if he had, there is no evidence that he did so in his capacity as an agent for the Clinton campaign as opposed to in his individual capacity, which would have been permitted.<sup>20</sup>

The Complaint also describes an alleged email in which Mr. Podesta is asked to speak to a potential donor to CTR.<sup>21</sup> The Complaint does not describe an email in which Mr. Podesta does any actual solicitation on behalf of CTR. Instead, the Complaint describes an email in which Mr. Podesta was allegedly asked to discuss his opinion of the efficacy of CTR's work.<sup>22</sup> The Commission does not consider "mere statements of political support," such as an opinion that CTR is effective, to be solicitation.<sup>23</sup> And even if the alleged statement were considered solicitation, an agent of a federal candidate is permitted to solicit soft money on behalf of an outside organization if the individual acts in his own capacity and not on the authority of the federal candidate.<sup>24</sup> Here, there is no evidence that Mr. Podesta solicited soft money for CTR, and even if he had, there is no evidence that he did so in his capacity as an agent for the Clinton campaign as opposed to in his individual capacity.

Finally, the Complaint alleges, again without providing the source of the information that gives rise to complainant's belief, that "CTR's expenditures are mostly for activities like opposition research, message development, surrogate training, reporter pitches, media booking, video production, 'rapid response' press outreach, and other 'earned media.'"<sup>25</sup> The Commission has consistently held that online content—including costs associated with researching and producing that content—is not a "public communication" unless a fee is paid to post it on another's website.<sup>26</sup> That also applies to distributing materials to reporters over the Internet. The

<sup>19</sup> FEC Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) at 7.

<sup>20</sup> *Id.*

<sup>21</sup> Complaint ¶ 8.

<sup>22</sup> *Id.*

<sup>23</sup> 11 C.F.R. § 300.2(m).

<sup>24</sup> FEC Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) at 7.

<sup>25</sup> Complaint ¶ 13.

<sup>26</sup> See, e.g., Federal Election Commission, Internet Communications, 71 Fed. Reg. 18589, 18595 (May 12, 2006)(explanation and justification) ("[P]osting a video on a Web site does not result in a 'public communication' unless it is placed on another person's Web site for a fee," even if costs were incurred to film the video); FEC Matter Under Review 6722 (House Majority PAC), General Counsel's Report (Aug. 6, 2013)(video placed on YouTube for no fee is not a public communication); FEC Matter Under Review 6522 (Lisa Wilson-Foley for Congress, *et al.*) General Counsel's Report at 7 (Feb. 5, 2013) (YouTube and Facebook postings and a website fail the content prong of the coordinated communications test because they are not placed for a fee on another's Web site and are therefore not public communications); FEC Matter Under Review 6477 (Turn Right USA), General Counsel's Report at 8 (Dec. 27, 2011) (video posted on a website for which respondent paid no fee did not satisfy the content prong of the coordinated communication test); FEC Matter Under Review 6657 (Akin for Senate), General Counsel's Report at 6-7 (May 16, 2013) ("The Commission has narrowly interpreted the term Internet communication 'placed for a fee,' and has not construed that phrase to cover payments for services necessary to make an Internet communication,"


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Complaint does not identify a single, specific expenditure that would qualify as a "coordinated communication" under 11 C.F.R. § 109.21 and therefore violate the Act's source and amount limits on contributions. The Complaint's "[u]nwarranted legal conclusions from asserted facts" and "mere speculation" are not enough to support a finding of reason to believe that Respondents violated the Act.<sup>27</sup>

### Conclusion

For the foregoing reasons, we respectfully request that the Commission dismiss this matter and take no further action.

Very truly yours,

  
Marc E. Elias  
Ezra W. Reese  
Counsel to Respondents

including renting an email list); FEC Matter Under Review 6414 (Carnahan in Congress Committee *et al.*), General Counsel's Report at 12 (Apr. 11, 2012) (a website is not a public communication even though researchers were paid to help build it).

<sup>27</sup> FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).